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IN THE

Supreme Court of the United States

October Term, 1964

LISBON SALESBOOK COMPANY, MARTIN SUFRIN, ISADORE SUFRIN, JOSEPH SUFRIN, AND MICHAEL SCHIEDLMEIER,

Appellants,

vs.

STATE OF OHIO,

Appellee.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

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No. .....

LISBON SALESBOOK COMPANY, ET AL.,
Appellants,

vs.

STATE OF OHIO,
Appellee.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Ohio, entered on July 8, 1964, affirming the judgments of the Court of Appeals of Columbiana County, Ohio, which said Court of Appeals had reversed the judgments of the Court of Common Pleas of Columbiana County, the Court of Common Pleas having sustained appellants' demurrers to certain indictments returned against appellants under the provisions of Section 2915.11, Revised Code of Ohio. The Supreme Court of Ohio denied rehearing in these consolidated cases on September 2, 1964. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeals herein and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in Volume XXXVII, No. 28, The Ohio Bar, July 13, 1964,

and is cited as 176 Ohio St. 482 (1964). The opinions and journal entries of the Court of Appeals of Columbiana County are not reported. The opinion of the Court of Common Pleas of Columbiana County is reported in 21 O.O. 2d 455, 182 N.E. 2d 641 (1961), and the journal entries of the Court of Common Pleas in each of these consolidated cases are not reported. Copies of the opinion and journal entries of the Supreme Court of Ohio are attached as "Appendix A". Copies of the journal entry and opinion of the Court of Appeals in the case of *State of Ohio* v. *Lisbon Salesbook Company*, Case Number 817, which journal entry and opinion are representative of and identical to the journal entries and opinions filed in each of the four other companion cases, are attached hereto as "Appendix B". Copies of the opinion of the Court of Common Pleas and the journal entry of the Court of Common Pleas in the case of *State of Ohio* v. *Lisbon Salesbook Company*, Case Number 7356, which journal entry is representative of and identical to the journal entries filed in each of the four other companion cases, are attached hereto as "Appendix C".

JURISDICTION

These are criminal proceedings initiated by the Grand Jury of Columbiana County, Ohio, which returned indictments against appellants, on September 21, 1961, in these causes under the provisions of Section 2915.11, Revised Code of Ohio, as amended in 129 Laws of Ohio 1409, effective September 1, 1961. The judgment of the Supreme Court of Ohio, affirming the judgments of the Court of Appeals of Columbiana County, was entered on July 8, 1964, and the Supreme Court of Ohio denied rehearing in these causes on September 2, 1964. Notices of Appeal were filed in the Supreme Court of Ohio on September 21, 1964. The jurisdiction of the Supreme Court to review the de-

cision of the Supreme Court of Ohio by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562 (1949); *Winters* v. *New York*, 333 U.S. 507 (1948).

QUESTION PRESENTED

Is the due process clause of the Fourteenth Amendment to the Constitution of the United States offended by Section 2915.11, Revised Code of the State of Ohio, a felony statute, for the reason that Section 2915.11, Revised Code, is vague, indefinite and uncertain causing men of common intelligence necessarily to guess at its meaning and differ as to its application, and particularly in the instant cases where the statute imposes an absolute criminal liability upon one who manufactures or prints a triplicate pad which can be used for many purposes, including the recording of retail sales, without reference to the guilty knowledge (scienter) or guilty purpose (mens rea) of the person who manufactures or prints such a triplicate pad?

STATUTES INVOLVED

Section 2915.11, Revised Code (as amended in 129 Laws of Ohio 1409. Effective 9-1-61):

"No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

"Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense,

such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years."

Section 2915.11, Revised Code (as section read prior to amendment in 129 Laws of Ohio 1409):

"No person shall vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

"Whoever violates this section shall be fined not more than five hundred dollars or imprisoned not more than six months, or both for a first offense; for each subsequent offense such person shall be fined not less than five hundred nor more than one thousand dollars or imprisoned not less than one nor more than three years, or both."

Section 13067., General Code (now substantially Section 2915.19, Revised Code):

"Whoever writes, prints or publishes an account of a lottery or scheme of chance, by whatsoever name, style or title denominated or known, stating when or where it is to be or has been drawn, or the prizes therein, or any of them, or the price of a ticket, or showing where a ticket may be or has been obtained, or giving publicity to such lottery or scheme of chance, shall be fined not more than five hundred dollars or imprisoned in jail not more than six months, or both."

STATEMENT OF THE CASE

At the September 1961 term of the Court of Common Pleas of Columbiana County, Ohio, the Grand Jury of Columbiana County returned indictments against the respective appellants, charging the individual appellants:

> "The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that [naming each individual appellant] on the 6th day of September, 1961, at the County of Columbiana aforesaid, did manufacture and print a certain ticket, order, or device for or representing an interest in a scheme of chance known as 'policy' and/or 'number's game' contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

Appellant, Lisbon Salesbook Company, was likewise charged as in the foregoing quoted indictment.

In addition to the first count as set forth above charging the manufacture and printing, etc., the individual appellants were charged with a second count as follows:

> "* * * and the jurors of the Grand Jury aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do find and present that said [naming each individual appellant] aforesaid, on the 6th day of September, 1961, at the County of Columbiana aforesaid, did aid, abet and procure the manufacture and printing of a certain ticket, order or device for or representing an interest in a scheme of chance known as 'policy' and/or 'number's game' contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

Appellants, pursuant to Section 2941.07, Revised Code of Ohio, thereupon filed a request that the appellee, State of Ohio, hereinafter referred to as appellee, furnish appellants with a bill of particulars setting forth specifically the nature of the offense with which appellants were charged in such indictments. G. William Brokaw, Prosecuting Attorney for Columbiana County, in response to the request of appellants, furnished appellants with the following bill of particulars:

"Now comes G. William Brokaw, Prosecuting Attorney of Columbiana County, and furnishes herein his Bill of Particulars in response to the request of counsel for the [defendants].

"The ticket, order, or device, is described as a pad of paper, 2¾ inches by 5¾ inches in size, containing 150 sheets, with 2 sheets of carbon paper attached at the back of said pad. The sheets in said pad are numbered, serially, from one (1) to fifty (50), with three (3) sheets—yellow, flimsy and white—each being given the number '1', and so on, so that each pad may be used for fifty (50) separate transactions.

"A pad, as described above, is attached to the Bill of Particulars in Case No. 7356, marked Exhibit '1', to which counsel is referred."

The Bill of Particulars furnished by the Prosecuting Attorney to each of the appellants was identical to the foregoing quoted Bill of Particulars, except that the last paragraph of the Bill of Particulars furnished to appellant, Lisbon Salesbook Company, was as follows:

"A pad, as described above, is attached hereto and marked 'Exhibit 1', as requested by counsel."

The appellants filed timely motions to quash the indictments on the ground that there was a "defect apparent upon the face of the record in this, to-wit: the act or conduct of which the [defendants] is accused does not constitute a violation of any Statute of the State of Ohio." The Court of Common Pleas, on October 27, 1961, overruled the motions of appellants to quash such indictments.

Thereupon, appellants demurred to the said indictments, contending that:

"1. The portion of Revised Code Section 2915.11, upon which the [indictments] is based, is in violation of the due process clause of Article 14, Paragraph 1 of the Constitution of the United States and the due course of law clause of Article 1, Paragraph 16 of the Constitution of the State of Ohio and is therefore unconstitutional and void;" and

2. The facts stated in the indictments do not show an offense punishable by the laws of the State of Ohio.

On December 14, 1961, the Court of Common Pleas sustained the appellants' demurrers to the indictments holding that:

> ". . . Section 2915.11 of the Ohio Revised Code as amended, effective September 1, 1961, as it applies to manufacturers and printers, is unconstitutional for the reason that said Section does not require that the manufacturing and printing be done with a knowledge or intent that the article manufactured or printed is to be used in the numbers game."

Thereafter, appellee perfected an appeal in each case from the decision and judgment of the Court of Common Pleas sustaining appellants' demurrers to the indictments to the Court of Appeals of Columbiana Country. On July 27, 1963, the Court of Appeals reversed the decision and judgment of the Court of Common Pleas in each of the cases and remanded the causes for further proceedings in accordance with law and said judgments.

On August 9, 1963, appellants filed their Notices of Appeal on questions of law in the Court of Appeals, which Notices of Appeal stated that the appellants' appeals to the Supreme Court of Ohio were based on cases involving a constitutional question under the federal and state constitutions, and in felony cases upon condition that leave to appeal be granted by the Supreme Court of Ohio. Thereafter, and on December 18, 1963, the Supreme Court of Ohio ordered that the motions of appellants for leave to appeal from the Court of Appeals are allowed.

The Supreme Court of Ohio, on July 8, 1964, affirmed the judgments of the Court of Appeals and, on September 2, 1964, the Supreme Court of Ohio denied rehearing in these causes. The Supreme Court of Ohio found that Section 2915.11, Revised Code of Ohio, as amended effective

September 1, 1961, did not violate either the due process clause of the Fourteenth Amendment to the Constitution of the United States or the due-course-of-law clause of Section 16, Article I of the Constitution of the State of Ohio.

The Supreme Court of Ohio, on September 23, 1964, certified and made it a part of the record in these causes and of the judgments and entries of affirmance theretofore rendered and made by the Supreme Court, that in the prosecution of error from the Court of Appeals of Columbiana County and in the arguments, both oral and by brief, made in the Supreme Court on behalf of each of the appellants, it was insisted and relied upon by appellants that Section 2915.11, Revised Code of Ohio, was unconstitutional as being in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; and that it became material to the determination of said causes in the Supreme Court of Ohio to determine said question so made by each of the appellants, which question was determined adversely to each of the appellants. A copy of Certificate As To Federal Question Involved is attached hereto as "Appendix D".

QUESTION IS SUBSTANTIAL

The question presented by these appeals is substantial in that it raises fundamental issues with respect to the power of state legislatures to forbid or command an act which is defined by terms so indefinite and vague as not to be susceptible to objective measurement thereby forcing men of common intelligence to guess at their meaning and to differ as to their application. The constitutional issue here presented has not been considered and set to rest by this Court. Therefore, this Court has not, in its void-for-vagueness decisions, articulated "the counterveiling pressures which require that a line be drawn somewhere" or explored "the considerations which delimit, on either

side, at least the broad range within which it must be drawn", and related "these considerations to the facts of the individual case." See Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 70 (1960).

The appellants were indicted under Section 2915.11, Revised Code, as amended in 1961, making it a felony for the first time in the State of Ohio to *manufacture* or *print* a "ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state." The indictments were in the words of the statute, except that they specified "a scheme of chance known as 'policy' and/or 'number's game', and omitted any allegation that it was located in or to be drawn, paid or carried on anywhere.

Prior to the amendment of Section 2915.11, Revised Code in 1961, the only statute which had been attempted to be applied to printed matter was Section 13067., Ohio General Code (now substantially Section 2915.19, Revised Code), which made it a misdemeanor to write, print or publish:

> ". . . an account of a lottery or scheme of chance, by whatsoever name, style or title denominated or known, stating when or where it is to be or has been drawn, or the prizes therein, or any of them, or the price of a ticket, or showing where a ticket may be or has been obtained; or giving publicity to such lottery or scheme of chance, . . ."

In *State v. Schwabie*, 53 Ohio L. Abs. 264, 84 N.E. 2d 768 (1948) (Court of Appeals), it was held that there must be not merely printing of tickets intended for a lottery, but circulation or distribution of a statement about the drawing or the prizes or the sale of tickets to constitute the offense set forth in Section 13067., Ohio General Code.

Thus, Judge Hurd, speaking for the Court of Appeals of Cuyahoga County, stated at page 272 of his opinion:

> "* * * Upon reason, logic and by the great weight of authority we conclude that the manifest purpose of § 13067 GC, is to prevent the publication of an account of a lottery, stating therein the place of the drawing, the prizes to be given or the price of the ticket, or showing where a ticket may be purchased.
>
> "It is quite obvious, therefore, that the evidence in this case of the mere printing of tickets by a printer without any publication, distribution or advertisement thereof, does not constitute a violation of § 13067 GC and therefore the trial court erred prejudicially in finding the defendant guilty under the evidence set forth in the record."

The legislature in 1961 did not amend the advertising statute (Section 13067, Ohio General Code—now substantially Section 2915.19, Revised Code), but drew upon the provisions of former section 2915.11, Revised Code, which had made offenses of the vending, selling, bartering or disposing:

> "* * * of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.
>
> "Whoever violates this section shall be fined not more than five hundred dollars or imprisoned not more than six months, or both for a first offense; for each subsequent offense such person shall be fined not less than five hundred nor more than one thousand dollars or imprisoned not less than one nor more than three years, or both."

Under these older statutes—Section 13067, General Code and former Section 2915.11, Revised Code—it is clear that the ticket, order or device referred to was the operative document in a scheme of chance actually being carried on;

that ticket which was "for or representing" the share or interest in the existing game. In *Francis* v. *United States*, 188 U.S. 375 (1903), construing the federal statute making it an offense knowingly to use the mail to send any instrument purporting to be or to represent a chance, share or interest in a lottery, this Court held, through Mr. Justice Holmes, that duplicate tickets held by the seller as a record of the purchasers' interests were not within the statute. At pages 377-78 of the *Francis* case, supra, Mr. Justice Holmes said:

> "A ticket, of course, is a thing which is the holder's means of making good his rights. The essence of it is that it is in the hands of the other party to the contract with the lottery as a document of title . . . 'represent' in the statute means, as we have already said, represent to the purchaser. It means stand as the representative title to the indicated thing; and that these slips did not do."

Even where the instrument has not been sold, and its possession is found criminal, the cases have been ones in which the game was already in operation, and the would-be seller intended that they would become instruments of title. E.g., *People v. Kravitz*, 287 N.Y. 475, 41 N.E. 2d 61 (1942), where the intending seller had a system by which as soon as the buyer picked out certain sealed numbers they were to represent his interest in the game.

In amending Section 2915.11, Revised Code, the legislature, by attempting to cover activity prior to the sale or advertising of instruments of title, but by using language previously applicable only to an existing game and instruments of existing interest in the game, rendered the scope of the statute so broad and uncertain as to make felonies of activities which it could not so regulate without denying due process.

In the earlier cases of the sale of such interests, there was

no question but that the seller would know the facts which rendered his action criminal. Under the new section, as construed by the trial court, by the Court of Appeals, and Supreme Court of Ohio, and in particular as applied by the prosecution in the instant cases, the sweep of the statute is so broad as inevitably to brand as criminal, acts which the legislature has no reasonable basis for placing in that category, or else to render the statute unreasonably vague as to what acts are intended to be covered. In either case, due process is denied.

The language of a criminal statute must be sufficiently certain to inform those who are subject to it what conduct on their part will render them liable to penalties, and to guide the judge and jury in its application. *United States v. Petrillo*, 332 U.S. 1, 7 (1947). In a series of cases, this Court has held that a state has no power, under the First and Fourteenth Amendments, to enact a statute which is defined by terms so indefinite and vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The test has since been cited with approval. See, e.g., *Baggett v. Bullitt*, . . . U.S. . . ., 12 L. Ed. 2d 377, 382 (1964); *Winters v. New York*, 333 U.S. 507, 515, 518 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Champlin Refining Co. v. Corporation Comm'n. of Oklahoma*, 286 U.S. 210, 242 (1932).

Moreover, the "standard of certainty in statutes punishing for offenses is [sic] higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948). And, the standards of certainty must be higher when dealing with the terms of a penal statute creating a new offense. *Winters v. New York*, 333 U.S. 507, 519-20 (1948); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *United States*

v. Reece, 92 U.S. 214, 219 (1875). Therefore, Section 2915.11, Revised Code, should, being a statute which creates a new offense, be held to strict standards of permissible statutory vagueness.

It is too clear for argument that as applied to the manufacture or printing of a document "for or representing" an interest in a numbers game it cannot become the instrument described in the identical federal statute until it is transferred to the purchaser (*Francis v. United States*, 188 U.S. 375 (1903)) or at least until some person forms the intent to use it for that purpose (*People v. Kravitz*, 287 N.Y. 475, 41 N.E. 2d 61 (1942)). Under either view, it is hard to imagine more than a minute fraction of cases in which there could be any doubt that the person so dealing with it would be aware of all the facts which bring the act within the older statutes. As construed by the trial court, Section 2915.11, Revised Code, is applicable to, and makes a felony of, the printing of a ticket or device without there being any of the requirements mentioned in either of those cases, and without regard to whether the printer has any knowledge or suspicion that what he has printed may at some subsequent time turn out to have been used by someone else as a receipt or record "for or representing" a chance in a numbers game.

As so construed, the trial court properly held Section 2915.11, Revised Code, unreasonable and a denial of due process of law. In *Kilbourne v. State*, 84 Ohio St. 247, 95 N.E. 824 (1911), defendant was indicted under a statute which prohibited the possession of various items, including journal brasses, removed from a railroad car without permission. Defendant demurred to the indictment on the ground that the statute was unconstitutional because it did not make knowledge of the fact of unlawful removal an element of the crime. After pointing out that no knowledge

was alleged, the Supreme Court of Ohio stated at pages 252-53 of its opinion.

> "The buying, receiving or having in possession is made a crime, although the buyer, receiver or possessor has no knowledge or information that said article or articles had been removed from any railway car, or other railway property. Knowledge is not made an ingredient of the offense as defined by this branch of the statute, and knowledge on the part of the accused is not charged in the indictment.
>
> "• • •
>
> "In framing the act under consideration, the legislature omits the word 'knowing' and provides nothing in its place, enabling the state to convict without showing that the accused had knowledge of the character of property he was buying. One may be innocent of a criminal intent in buying articles named in the statute, and may have dealt with them in the usual course of trade, and yet be convicted if it turn out that they had been at some time by some person removed from a locomotive, motor, car, or other designated railway property."

The statute was held beyond the constitutional authority of the legislature.

In *Morisette v. United States*, 342 U.S. 246 (1952), the federal due process clause was construed with like effect. Defendant had taken bomb casings which he had found on a government reservation. The statute concerning conversion of government property made no requirement of knowledge of the facts upon which the government's title rested, or on which defendant's lack of right rested, and the lower court treated none as required. This Court indicated that it was able to save the statute because the offense resembled the common law crime of theft, and it could look to the common law and read in a requirement of knowledge. The conviction was reversed for failure to recognize that element.

In the present cases, the crime is statutory and bears no resemblance to any common-law crime. This Court has stressed the lack of common-law meaning and common-law precedence as a reason for striking down statutes. See *Lanzetta v. New Jersey*, 306 U.S. 451, 454-55 (1939); *Champlin Refining Co. v. Corporation Comm'n. of Oklahoma*, 286 U.S. 210, 242-43 (1932); and distinction of *Nash v. United States*, 229 U.S. 373 (1913), in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 460 (1927). If the Ohio legislature had intended knowledge to be an element it could easily have inserted the word "knowingly," as it has done in many other statutes. The result is to require a printer to insure against any future wrongful use of the printed material, whether or not he knows about it as a probability, and whether or not he has any way of determining that fact. If it is unconstitutional to do this with regard to a defendant's knowledge of past facts (*Kilbourne v. State*, 84 Ohio St. 247, 95 N.E. 824 (1911)), it is even more unreasonable to do so with regard to facts which, at the time of defendant's action, lie in the future. If it is unreasonable to require a purchaser to determine at his peril whether an item has been stolen, or that a document he passes has been forged (*Anderson v. State*, 7 Ohio 250, part 2 (1836)), it is even more so to require him to determine at his peril whether material he prints will become the document which represents to its purchaser his interest in or chance in a numbers game.

"Scienter" has frequently been found a component of the offense created by the statute charged with indefiniteness, and in each case the statute has been sustained, in part on the notion that the requirement of guilty knowledge clarified it. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *American Communications Ass'n. v. Douds*, 339 U.S. 382 (1950); *Screws v. United States*, 325

U.S. 91 (1945); *United States v. Ragen*, 314 U.S. 513 (1942); *Gorin v. United States*, 312 U.S. 19 (1941); *Omaechevarria v. Idaho*, 246 U.S. 343 (1918). This Court has said that "since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable." *American Communications Ass'n. v. Douds*, 339 U.S. 382, 413 (1950). Again in *Screws v. United States*, 325 U.S. 91, 102 (1945), Mr. Justice Douglas, speaking for the Supreme Court, suggested that:

> ". . . where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware. . . ."

In reversing, in each of the within cases, the trial court's action holding Section 2915.11, Revised Code, unconstitutional, the Supreme Court of Ohio and the Court of Appeals did not supply by implication the requirement of illegal purpose, or of knowledge of the facts placing the act within the statute. The Court of Appeals construed the statute as requiring that the instrument printed be "such that an ordinary person reading or examining the same would conclude that it represented a share or interest in a game of chance." Such a construction is to make the statute one which renders a defendant guilty of a felony for simple negligence, although no such words are found anywhere in the statute, and although a seller of such in-

strument with the knowledge and intent that it be a share in a game of chance is, under the provisions of Section 2915.10, Revised Code, guilty of a misdemeanor only, on his first offense. The result is to place an unreasonable restriction on the business of being a manufacturer or a printer by inserting into Section 2915.11, Revised Code, words which the legislature did not include, thus making the penalty arbitrarily high for the crime as redefined. State legislation which is applied so as to force persons in the exercise of their civil liberties to guess at their peril exactly the location of the line of federal protection is too vague and indefinite to meet the constitutional requirment of due process established by the First and Fourteenth Amendments. *Watkins v. United States*, 354 U.S. 178, 208 (1957); *Winters v. New York*, 333 U.S. 507, 519-20 (1948); *Herndon v. Lowry*, 301 U.S. 242, 261-62 (1937).

In *People v. Estreich*, 75 N.Y.S. 2d 267, 272 App. Div. 698 (1947), *aff'd.*, 297 N.Y. 910 (1948), a statute forbade junk dealers from buying certain equipment without first making "diligent inquiry" as to the authority of the seller to sell it. When the legislature removed the clause as to diligent inquiry, the court held the statute unconstitutional, and in its opinion treated the prior requirement as valid because it did not require the dealer to do any more than make the inquiry, without regard to whether what he learned was correct or not. The Court of Appeals of Columbiana County, whose opinion bears the tacit approval of the Supreme Court of Ohio, would require the instant appellants not merely to try, but to succeed or be guilty of a felony.

CONCLUSION

These appeals present a substantial federal question which is important and which merits the fullest consideration by this Court.

Respectfully submitted,

ISADORE TOPPER,
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November .., 1964

APPENDIX A

I

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO
City of Columbus.

1964 TERM
To wit:
Wednesday, July 8, 1964

STATE OF OHIO,
Plaintiff-Appellee,

vs.

LISBON SALES BOOK COMPANY, MARTIN SUFRIN, ISADORE SUFRIN, JOSEPH SUFRIN, MICHAEL SCHIEDLMEIER,
Defendants-Appellants.

Nos.: 38370, 38371, 38372, 38373 & 38374

APPEALS FROM THE COURT OF APPEALS FOR COLUMBIANA COUNTY

This cause, here on appeal from the Court of Appeals for Columbiana County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellants its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Columbiana County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ..... day of ..... 19....

..... Clerk

..... Deputy

II.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO — 1964 TERM
City of Columbus. — September 2, 1964

STATE OF OHIO,
Plaintiff-Appellee,

vs.

LISBON SALES BOOK COMPANY ET AL.,
Defendants-Appellants.

Nos.: 38370, 38371, 38372, 38373 & 38374

REHEARING

It is ordered by the Court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ... Page ....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this ..... day of

..... 19....

..... Clerk.

By ..... Deputy.

III.

Statement of the Case.

THE STATE OF OHIO, APPELLEE, *v.* LISBON SALES BOOK CO., APPELLANT.

THE STATE OF OHIO, APPELLEE, *v.* SUFRIN, APPELLANT. (Three cases.).

THE STATE OF OHIO, APPELLEE, *v.* SCHIEDLMEIER, APPELLANT.

Criminal law—Manufacturing, printing and selling of "numbers game" tickets prohibited — Indictment legally sufficient to charge offense, when—Evidence—Proof of general intent sufficient.

1. An indictment charging an offense under Section 2915.11, Revised Code, is legally sufficient if it contains a statement charging the offense in the words of such section, hence it is not essential that the indictment specifically alleges scienter (knowledge) or mens rea (guilty purpose). (Section 2941.05, Revised Code.)
2. A statute defining an offense, which is silent on the question of intent, thereby indicates the purpose of the General Assembly to make proof of a specific intent unnecessary, and, therefore, proof of a general intent to do the proscribed act is sufficient; there are no common-law crimes and no common-law criminal procedure in Ohio. (Paragraph two of the syllabus of *State v. Healy*, 156 Ohio St., 229, approved and followed.)

(Nos. 38370, 38371, 38372, 38373 and 38374—Decided July 8, 1964.)

APPEALS from the Court of Appeals for Columbiana County.

At the September 1961 term of the Court of Common Pleas, the Grand Jury of Columbiana County returned

indictments in these causes under the provisions of Section 2915.11, Revised Code. The appellants filed timely motions to quash the indictments on the ground that there was a "defect apparent upon the face of the record." The Court of Common Pleas overruled these motions to quash.

Thereupon appellants demurred to the indictments, contending that:

(1) Each of the indictments violates the due process clause of Section 1, Article XIV, Amendments, Constitution of the United States, and the due-course-of-law clause of Section 16, Article I of the Constitution of the state of Ohio; and

(2) the facts stated in the indictments do not show an offense punishable by the laws of the state of Ohio.

The Court of Common Pleas sustained appellants' demurrers to the indictments upon the ground that "Section 2915.11 of the Revised Code as amended, effective September 1, 1961, as it applies to manufacturers and printers, is unconstitutional for the reason that said section does not require that the manufacturing and printing be done *with a knowledge or intent* that the article manufactured or printed is to be used in the numbers game." (Emphasis added.)

Plaintiff, the state of Ohio, appellee herein, perfected an appeal in each case from the judgement of the Court of Common Pleas to the Court of Appeals of the Seventh Appellate District. The Court of Appeals reversed the judgments of the Court of Common Pleas and remanded the causes for further proceedings in accordance with the law.

Each cause is now before this court upon the allowance of appellant's motion for leave to appeal on questions of law from the judgment of the Court of Appeals.

Mr. William B. Saxbe, attorney general, *Mr. G. William*

Brokaw, prosecuting attorney, and *Mr. Theodore R. Saker*, for appellee.

Messrs. Reed, Smith, Shaw & McClay, Mr. Gilbert J. Helwig, Messrs. Topper & Alloway and *Mr. N. Victor Goodman*, for appellants.

HERBERT, J. The appellants' assignments of error may be summarized as follows:

(1) The Court of Appeals erred in holding that said indictments set out sufficient facts to constitute, or state, an offense under Section 2915.11, Revised Code, or, in other words, that the reversal by the Court of Appeals of the judgments of the Court of Common Pleas sustaining the demurrers, was perjudicial error.

(2) Section 2915.11. Revised Code, as to these appellants, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States and also the due-course-of-law clause of Section 16, Article I of the Constitution of the state of Ohio, "for the reason that Section 2915.11, Revised Code, purports to impose an absolute criminal liability upon one who manufactures or prints a triplicate pad which can be used for many purposes, including the recording of retail sales and also can be used in connection with 'policy' and 'numbers game' without reference to the guilty knowledge (scienter) or guilty purpose (mens rea) on the part of a person who manufactures or prints such a ticket, order or device."

Section 2915.11 of the Revised Code, in its pertinent part, provides:

"No person shall manufacture, print, vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state."

The indictment of the corporate appellant, Lisbon Sales Book Company, is in this language:

"* * * did manufacture and print a certain ticket, order, or device for or representing an interest in a scheme of chance known as 'policy' and/or 'numbers game' contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

The remaining appellants are charged in the same language as above quoted in a first count, and there is also charged against each of the remaining appellants a second count, as aiders and abetters. The disposition of the demurrer to the indictment against the corporate appellant will dispose of the demurrers to the indictments against the remaining individual appellants.

Turning to the first assignment of error it is recognized that an indictment charging an offense is sufficient if it is in the words of the statute describing the offense or declaring the matter charged to be a public offense. Section 2941.05, Revised Code; *State v. Childers*, 133 Ohio St., 508; *State v. Yudick*, 155 Ohio St., 269.

Section 2941.30, Revised Code, confers broad powers and discretion upon a court to amend an indictment "at any time before, during, or after trial." The indictment here follows the wording of the statute in charging the offense. The courts below do not question this conclusion. The trial court in its opinion (88 Ohio Law Abs., 208, 215) overruling the motion to quash and sustaining the demurrer to the indictment said:

"The indictment follows the statute, as is perfectly proper for an indictment to do * * *."

If the statute, Section 2915.11, Revised Code, is constitutional, it follows that the indictment states facts sufficient to charge the offense.

The answer to the second assignment of error is disposi-

tive of the issues in this case. The appellant complains that its constitutional rights are being violated, that the indictment is fatally defective because it is not alleged that appellant "knowingly" (scienter) committed any offense, and/or that it had a guilty purpose (mens rea) in printing certain tickets, etc. 28 Ohio Jurisprudence (2d), 443 *et seq.*, Section 37, states the following:

"It is a well settled principle of law that guilty knowledge on the part of the accused need be averred only when it is an essential element of the offense charged. If guilty knowledge is a necessary element of a crime a failure to aver it is not cured by any statutory provision. If a statute or ordinance makes it a part of the description of an effense, it must be averred.

"On the other hand, if guilty knowledge is presumed it need not be averred, and it has been said that all men are presumed to have that knowledge of language, men, and things which commonly prevails. So too, as a general rule, where a statute or ordinance is silent as to the defendant's knowledge, the indictment or other accusation need not allege guilty knowledge. • • •

"The nature of an offense may be such that when it is charged specifically, the charge will contain within its terms an averment of knowledge. For instance, charges of concealing stolen goods and keeping a disorderly house have been held sufficient allegation of scienter, since a person could not have 'stolen' goods, or 'keep a disorderly house' without knowledge thereof."

For over 150 years the people of Ohio have declared through Section 6, Article XV, Ohio Constitution, that "lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this state."

Policy, numbers game and similar gambling activities are in the nature of lotteries. Lotteries have long been con-

demned in the state of Ohio, and even the General Assembly is without power to legalize them either directly or indirectly. *City of Columbus v. Barr*, 160 Ohio St., 209; *Troy Amusement Co. v. Attenweiler*, 64 Ohio App., 105; *Kraus v. City of Cleveland*, 89 Ohio App., 504; and *Zepp v. City of Columbus*, 66 Ohio Law Abs., 4.

State v. Healy, 156 Ohio St., 229, in the second paragraph of the syllabus, states:

"A statute defining an offense, which is silent on the question of intent, thereby indicates the purpose of the General Assembly to make proof of a specific intent unnecessary, and, therefore, proof of a general intent to do the proscribed act is sufficient; there are no common-law crimes and no common-law criminal procedure in Ohio. (*State v. Huffman*, 131 Ohio St., 27, approved and followed.)"

The second paragraph of the syllabus of *State v. Morello*, 169 Ohio St., 213, is as follows:

"Under Section 4301.22 (B), Revised Code, making an offense the sale of intoxicants to an intoxicated person, which statute makes no reference to scienter, it is not necessary in order to obtain a conviction to prove that the accused knew that the person to whom he is charged with having sold intoxicants was intoxicated, where the means of such knowledge were available to the accused or the common good imposed a duty upon him to obtain it. (The ninth paragraph of the syllabus of *Miller v. State*, 3 Ohio St., 475, overruled.)"

The language of the indictment in the case at bar in its terms descriptive of the offense, in substance, alleges knowledge. The words in the indictment to wit, "did * * * print a certain ticket * * * representing an interest in a scheme of chance known as 'policy' and/or 'numbers game' contrary to the form of the statute * * *," certainly advise the appellant that it is violating the law.

22 Corpus Juris Secundum, 100, Section 30, reads as follows in its pertinent part:

"A criminal intent or guilty knowledge is an essential element of a crime defined by statute where expressly or impliedly required by the statute, and in various instances statutes have made criminal intent or guilty knowledge an essential ingredient of the offense defined, as where it requires the act to be done 'knowingly,' etc.

"On the other hand, a criminal intent or guilty knowledge is not always necessary to constitute a crime, since conduct alone without regard to the intent of the doer may be sufficient. The Legislature may forbid the doing of, or the failure to do, an act and make its commission or omission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, although the intent of the doer may have been innocent, or at least it may do so with respect to offenses *malum prohibitum*. In such cases, the doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt."

We are asked to find that Section 2915.11, Revised Code, violates both the federal and state Constitutions. A review of the authorities casts substantial doubt upon appellant's claim, and it must be denied. A legislative act is persumed to be valid. *State, ex rel. Dickman, a Taxpayer, v. Deffenbacher, Dir.*, 164 Ohio St., 142; *City of Xenia v. Schmidt*, 101 St., 437; *State, ex rel. King, Pros. Atty., v. Sherman, Aud.*, 104 Ohio St., 317; and *State, ex rel. City of Columbus v. Ketterer*, 127 Ohio St., 483.

In *State, ex rel. Ely, Cotrustee, v. Brenneman, Judge*, 176 Ohio St., 311, 313, appears the following:

"Before this, or any other court in Ohio, may hold that

an enactment of the General Assembly is unconstitutional, such infirmity must appear beyond a reasonable doubt. *State, ex rel. Dickman, v. Deffenbacher, supra.*"

Recognizing that the judgment in this cause, at this time, is not or may not be final, but that a trial on the merits will probably follow, we hold that the General Assembly was well within constitutional boundaries in the enactment of Section 2915.11, Revised Code.

Therefore, the judgment of the Court of Appeals is affirmed.

Judgments affirmed.

ZIMMERMAN, MATTHIAS, O'NEILL AND GRIFFITH, JJ., concur.

TAFT, C. J., and GIBSON, J., dissent.

TAFT, C. J., dissenting. I agree with the following statement in the opinion of the Court of Appeals:

"* * * a reasonable and practical construction can be given to the language of the statute if we assume that the Legislature intends the preposition 'for' and the words 'a number of shares or an interest in a scheme of chance' to be read together. It then defines a crime the gravamen of which is that the printing on the ticket is such that an ordinary person reading or examining same would conclude that it represented a share or interest in a game of chance."

However, I do not believe it necessary to determine whether the statute as so construed is unconstitutional because it does not require scienter. See *Dragelevich v. City of Youngstown* (1964), 176 Ohio St., 23, 197 N.E. (2d), 334. Cf. *State v. Mapp* (1960), 170 Ohio St., 427, 432 *et seq.*, 166 N.E. (2d), 387; *State* v. *Jacobellis* (1962), 173 Ohio St., 22, 29, 179 N.E. (2d), 777. This is because of the following statements in the opinion of the Court of Appeals, with which I also agree:

"When we examine the description and sample contained

in and attached to the bill of particulars it becomes apparent that a legitimate printer, aware of the statute and fearful of its penalties, might examine this ticket and have no reason to suspect that it represented contraband under the statute. It appears to be a sales ticket. In the absence of special knowledge, experience or evidence no ordinary person would consider these books as being of such a nature as to sound an alarm leading to an inquiry as to whether the substantially blank sheets of paper had a special usefulness which was illicit under the statute.

"This court very much doubts that the tickets described in the bill of particulars and attached thereto, and marked 'exhibit 1,' are tickets 'for or representing an interest in a scheme of chance known as the number game.'"

Section 2941.07, Revised Code, reads in part:

"The prosecuting attorney * * * shall furnish a bill of particulars setting up specifically the nature of the offense charged."

A bill of particulars is required where, as in the instant cases, an indictment, although sufficient to charge an offense, is so wanting in particularity or information or is so extremely general, vague, uncertain or indefinite in the language of the charge that the defendant is not given a fair and reasonable opportunity to prepare his defense. *State v. Whitmore* (1933), 126 Ohio St., 381, 185 N.E., 547.

As its name indicates, the purpose of a bill of particulars is "to state specifically the nature of the offense charged." *State v. DeRighter* (1945), 145 Ohio St., 552, 556, 62 N.E. (2d), 332; *State v. Petro* (1947), 148 Ohio St., 473, 76 N.E. (2d), 355, 5 A. L. R. (2d), 425.

As stated in 27 American Jurisprudence, 672, Section 112:

"In so far as its purpose is concerned, a bill of particulars is in the nature of a pleading, and, when furnished, operates to limit the prosecution in its proof to the specifications

therein contained * * *." See *State v. Bernstein* (Cuyahoga County, 1937), 25 Ohio Law Abs., 291, appeal dismissed, 133 Ohio St., 74, 11 N.E. (2d), 701.

If the prosecution is limited in its proof to what is specified in the indictment as made definite by the bill of particulars, it is apparent, as the above-quoted portion from the Court of Appeals opinion indicates, that the prosecution could not offer sufficient proof to support convictions in the instant cases. It follows that the judgments of the Common Pleas Court, sustaining demurrers to the indictments, could not have prejudiced the state and should have been affirmed.

GIBSON, J., concurs in the foregoing dissenting opinion.

APPENDIX B

I

IN THE COURT OF APPEALS OF THE STATE OF OHIO SEVENTH DISTRICT COLUMBIANA COUNTY

STATE OF OHIO,
Plaintiff-Appellant,

vs.

THE LISBON SALESBOOK COMPANY,
Defendant-Appellee.

ENTRY

Case No. 817

This cause came on to be heard upon the appeal of The State of Ohio, appellant, from the decision and judgment of the Court of Common Pleas of Columbiana County which sustained the demurrer of defendant to the indictment herein, and the court, being duly advised in the premises, and upon the record of the proceedings in the Court of Common Pleas and the briefs and arguments, of counsel finds as follows:

1. Defendant was indicted by the Grand Jury of Columbiana County, charging that defendant:

> "* * * did manufacture and print a certain ticket, order, or device for or representing an interest in a scheme of chance known as "policy" and/or "number's game" contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

on the 6th day of September 1961 in Columbiana County, Ohio.

2. On motion of defendant-appellee, the Prosecutor of Columbiana County furnished a Bill of Particulars which read as follows:

> "NOW comes G. William Brokaw, Prosecuting Attorney for Columbiana County, and furnishes herein a Bill of Particulars in response to the request of counsel for the defendant.
>
> "The ticket, order or device is described as a pad of paper 2¾" by 5¾" in size, containing 150 sheets with two sheets of carbon paper attached at the back of said pad. The sheets in said pad are numbered serially from 1 to 50, with three sheets—yellow, flimsy and white—each being given the number "1" and so on, so that each pad may be used for 50 separate transactions. A pad as described above is attached hereto and marked "Exhibit 1" as requseted by counsel.
>
> (Signed) G. William Brokaw,
> Prosecuting Attorney"

3. The indictment against defendant-appellee, without reference to the Bill of Particulars, is sufficient on its face to state an offense under the statute under which defendant-appellee was charged. (Section 2915.11, Revised Code).

4. The Bill of Particulars cannot create or cure a defect in an indictment, and the indictment, being sufficient upon its face cannot be made demurrable by the Bill of Particulars.

5. Section 2915.11 of the Revised Code is not unconstitutional.

6. The indictment against defendant-appellee, therefore, is sufficient and valid, and the demurrer thereto should have been overruled; as a consequence thereof, it is found that the decision and judgment of the Common Pleas Court of Columbiana County herein should be reversed and this cause remanded for further proceedings in accordance with law.

It is, therefore, ordered, adjudged and decreed that decision and judgment of the Common Pleas Court of Columbiana County heretofore rendered herein be, and the same is hereby reversed, and this cause is remanded for further proceedings in accordance with law and this judgment.

Exceptions to defendant-appellee.

.....
Judge

.....
Judge

.....
Judge

Approved:
William B. Saxbe,
Attorney General of Ohio,
G. William Brokaw,
Prosecuting Attorney,
Lisbon, Ohio,
Attorneys for Plaintiff-Appellant
Topper & Alloway,
Attorneys for Defendant-Appellee

II

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,
Plaintiff-Appellant,

vs.

LISBON SALES BOOK COMPANY,
Defendant-Appellee.

APPEARANCES

G. William Brokaw, Prosecuting Attorney, Lisbon, Ohio, and Theodore R. Saker, Assistant Attorney General, Columbus, Ohio, for Plaintiff-Appellant.

Michael W. Kosach, Youngstown, Ohio, and Gilbert Helwig, Pittsburgh, Pennsylvania, for Defendant-Appellee.

Hon. Paul W. Brown,
Hon. John L. Donahue,
Hon. James G. France, JJ.

Dated: February 19, 1963

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

OPINION

Case No. 817

BROWN, P.J.

This is an appeal from the ruling of the Court of Common Pleas of Columbiana County in sustaining defendants' demurrers to the indictments.

The indictment charged that the Lisbon Sales Book Company, an Ohio corporation, on the sixth day of September, 1961, at the County of Columbiana, Ohio, did manufacture and print a certain ticket, order or device for or representing an interest in a scheme of chance known as "policy" and or "numbers game".

Revised Code Section 2915.11, effective September 1, 1961, was a revision of Revised Code Section 2915.11, effective October 1, 1953. The earlier statute made or declared it to be a crime to vend, sell, barter or dispose of a ticket for or representing a number of shares or an interest in a scheme of chance known as "policy", "numbers game". The revision of this statute, under which this offense falls, made an additional prohibition against the printing or manufacturing of such tickets.

The Prosecuting Attorney upon the request of the defendant furnished a bill of particulars stating as follows:

> "The ticket, order, or device, is described as a pad of paper, $2\frac{3}{4}$ inches in size, containing 150 sheets, with 2 sheets of carbon paper attached at the back of said pad. The sheets in said pad are numbered, serially, from one (1) to fifty (50), with three (3) sheets—yellow, flimsy, and white—each being given the number '1', and so on, so that each pad may be used for fifty (50) separate transactions.
>
> "A pad, as described above, is attached hereto and marked 'Exhibit 1', as requested by counsel."

Thereafter the trial court sustained a demurrer to the indictment holding that "Section 2915.11 of the Ohio Revised Code as amended, effective September 1, 1961, as it applies to manufacturers and printers, is unconstitutional for the reason that said Section does not require that the manufacturing and printing be done with the knowledge or intent that the article manufactured or printed is to be used in the numbers game."

Since the statute does not require that the ticket be used in the numbers game, the trial court's finding that the reason for unconstitutionality is that no knowledge that it be used in the numbers game is required is confusing. Apparently the statute was held to be unconstitutional because the defendants printed or manufactured a ticket for or representing an interest in the numbers game without any notice or knowledge that the printed matter was in fact such a ticket, or on the basis that the word "for" in the statute meant "to be used for" or "useful for", and that the statute then read: "to be used for or useful in * * * a game of chance known as policy or the numbers game."

When we examine the description and sample contained in and attached to the Bill of Particulars it becomes apparent that a legitimate printer, aware of the statute and fearful of its penalties, might examine this ticket and have no reason to suspect that it represented contrband under the statute. It appears to be a sales ticket. In the absence of special knowledge, experience or evidence no ordinary person would consider these books as being of such a nature as to sound an alarm leading to an inquiry as to whether the substantially blank sheets of paper had a special usefulness which was illicit under the statute.

This court very much doubts that the tickets described in the Bill of Particulars and attached thereto, and marked "Exhibit 1", are tickets "for or representing an interest in a scheme of chance known as the numbers game. On the other hand, we have very little doubt that evidence would be available under a different indictment to show that such tickets are used in and useful for the numbers game. This difficulty then arises: A bill of particulars cannot create or cure a defect in an indictment, an indictment sufficient upon its face cannot be made demurrable by a bill of particulars.

Wharton Criminal Law and Procedure (1957), Volume 4, Page 725, et seq.

Is the indictment sufficient upon its face? Is the statute sufficiently definite in describing a crime? Is the statute valid under the "due process" provisions of the Constitution?

If we interpret the word "for" in Revised Code Section 2915.11 to mean "useful for" and further hold that the balance of this prepositional clause is "a scheme of chance known as the policy or numbers game", we are broadening the statute to such a degree that the manufacturer of pads of paper of this or a similar size might be found guilty under this statute.

We must presume, as did Judge Fess in his excellent opinion in *State of Ohio v. Williams*, 94 Ohio App. 249, that the legislature in enacting Revised Code Section 2915.11 had no intention or purpose of making innocent persons criminally liable. A portion of the first paragraph of the syllabus in that case states:

> "* * * under a charge of violating a statute which does not by its terms include scienter as an element of the offense, where the means of knowledge or the circumstances are such that the accused is not bound at his peril to know the fact and obey the law, proof of knowledge of the fact is essential to support a conviction."

On the other hand, Chief Justice Weygandt in *Eastman v. State*, 131 Ohio St. 1 at page 8, said:

> "* * * a statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations, will not render it nugatory."

With these two propositions in mind we conclude that a reasonable and practical construction can be given to the

language of the statute if we assume that the legislature intends the preposition "for" and the words "a number of shares or an interest in a scheme of chance" to be read together. It then defines a crime the gravamen of which is that the printing on the ticket is such that an ordinary person reading or examining same would conclude that it represented a share or interest in a game of chance.

We must then determine whether the indictment on its face is valid as stating a crime and whether the statute so construed is constitutional because it does not require scienter. We conclude that under our construction of the statute, the indictment is valid. We find that the statute falls within the rule of *Shevlin-Carpenter Company v. State of Minnesota*, 218 U.S. 57, pages 69, 70, 54 L. Ed. 930, 35, 36; 30 Sup. Ct. Rep. 663. In the case of *United States v. Balint, et al.*, 258 U.S. 250, Mr. Chief Justice Taft cited the case of *Shevlin-Carpenter Company v. State of Minnesota*, 218 U.S. 57, and said:

> "* * * in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes * * *."

Under this rule scienter is not required. The rule is so definite and so well established that an extensive examination of state court decisions reveals that the general proposition, "is scienter a requirement of a statutory crime?" is almost universally answered in the negative. Reference is made to Wharton's Criminal Law and Procedure (1957),

Volume 1, Page 28, et seq., for the numerous cases there cited.

Whether the defendant in fact did the act then becomes the only question. *Rooney v. North Dakota*, 196 U.S. 319, 49 L. Ed. 494, 25 S. Ct. 264, 3 Ann. Cas. 76.

This cannot be determined upon demurrer unless the bill of particulars can be considered as creating a defect in the indictment. We have already decided this in the negative.

Since the statute as construed is constitutional the demurrer to the indictment should have been overruled. We regret that we cannot consider the matters shown by the bill of particulars since they appear to be dispositive of the matter upon the merits. The case is reversed and remanded for further proceedings.

DONAHUE, J., Concurs.
FRANCE, J., Concurs.

APPENDIX C

I.

IN THE COURT OF COMMON PLEAS

Case No. 7356

STATE OF OHIO,

Plaintiff,

vs.

LISBON SALES BOOK COMPANY,

Defendant.

JOURNAL ENTRY

This day this cause came on for hearing on the demurrer of the defendant to the indictment. The matter was heard on the briefs of counsel for the State and for the Defendant and on oral argument of counsel.

Upon consideration, the Court finds that Section 2915.11 of the Ohio Revised Code as amended, effective September 1, 1961, as it applies to manufacturers and printers, is unconstitutional for the reason that said Section does not require that the manufacturing and printing be done with a knowledge or intent that the article manufactured or printed is to be used in the numbers game.

The demurrer to the indictment is therefore sustained. Bond heretofore posted is continued, pending appeal. Exceptions to the State.

Make Record.

JOEL H. SHARP,
Judge

EXAMINED BUT NOT APPROVED:
W. B. MOORE, JR.,
Counsel for Defendant.
APPROVED:
G. WILLIAM BROKAW,
Prosecuting Attorney,
JOHN W. GLEASON,
Assistant Attorney General and
Assistant Prosecuting Attorney.
Dated: December 14, 1961

II.

COURT OF COMMON PLEAS, COLUMBIANA COUNTY

THE STATE OF OHIO,
Plaintiff,
vs.
LISBON SALES BOOK COMPANY,
Defendant.

THE STATE OF OHIO,
Plaintiff,
vs.
MARTIN SUFRIN,
Defendant.

THE STATE OF OHIO,
Plaintiff,
vs.
ISADORE SUFRIN,
Defendant.

THE STATE OF OHIO,
Plaintiff,
vs.
JOSEPH SUFRIN,
Defendant.

THE STATE OF OHIO,
Plaintiff,
vs.
MICHAEL SCHIEDLMEIER,
Defendant.

(Five Cases).

(Nos. 7356-7360—Decided December 14, 1961.)

OPINION

SHARP, J. All these cases come into this court on defendants' demurrer to the indictments.

The demurrers are identical and are as follows:

"Now comes the Defendant and demurs to the Indictment on the following grounds:

"1. The portion of Revised Code Section 2915.11, upon which the Indictment is based, is in violation of the due process clause of Article 14, Paragraph 1 of the Constitution of the United States and the due course of law clause of Article 1, Paragraph 16 of the Constitution of the State of Ohio and is therefore unconstitutional and void.

"2. The Indictment does not state facts constituting a crime under the laws of this State."

The defendants have filed identical motions in support of their demurrers and the State has filed a brief in reply thereto.

Counsel are now permitted to present oral arguments supporting and supplementing their written briefs.

Thereupon, arguments were made to the court.

The court:

The Revised Code Section 2915.11 which the State claims the Defendants have violated reads as follows:

"No person shall manufacture, print, vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

"Who ever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years."

The indictments under which the defendants are charged are as follows:

"The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County (Columbiana) aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that (and in each case the individual is named, that is, Martin Sufrin in Case No. 7357, Isadore Sufrin in Case No. 7358, Joseph Sufrin in Case No. 7359, Michael Schiedlmeier in Case No. 7360) on the 6th day of September, 1961, at the County of Columbiana aforesaid,

"FIRST COUNT

"Did manufacture and print a certain ticket, order, or device for or representing an interest in a scheme of chance known as 'policy' and/or 'numbers game' contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

"SECOND COUNT

"And the jurors of the Grand Jury aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that said Martin Sufrin (and each of the other three individuals defendants) aforesaid, on the 6th day of September, 1961, at the County of Columbiana aforesaid, did aid, abet and procure the manufacture and printing of a certain ticket, order or device for or representing an interest in a scheme of chance known as 'policy' and/or 'numbers game,' contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

The indictment of the corporation itself is different in that it contains only the first count charging the corpora-

tion with manufacturing and printing the ticket, order or device, and does not contain the second count charging the corporation with aiding, abetting and procuring the manufacture and printing of such a ticket, order or device.

The indictment follows the wording of Section 2915.11 and by virture of Section 2941.05 of the Revised Code of Ohio:

"In an indictment * * * charging an offense, each court [count] shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. * * * It may be in the words of the section of the Revised Code describing the offense * * *."

Therefore, if an indictment follows the wording of the statute it does state facts constituting a crime under the State of Ohio, provided, of course, that the statute sets forth a crime. If the statute does not set forth a crime it, the statute, would be unconstitutional and the indictment itself would not state facts constituting a crime under the laws of the State of Ohio.

This matter was earlier before this court on defendants' motion to quash the indictment "by reason of a defect apparent upon the face of the record in this, to wit: the act or conduct of which the defendant is accused does not constitute a violation of a statute of the State of Ohio." This motion was argued and the court found that the determination of said motion hinged largely on interpretation of the word "for" in the statute where it states that:

"No person shall manufacture, print, vend, sell, barter, or dispose of a ticket, order, or device *for* or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, * * *."

The court in his opinion on said motion held that the

word "for" meant "to be used in connection with" and that, therefore, the pertinent part of the statute should read as follows:

"No person shall manufacture, print, vend, sell, barter, or dispose of a ticket, order, or device used in connection with representing a number of shares or an interest in a scheme of chance known as 'policy,' and so forth."

The court therefore said in his opinion:

"It is my considered opinion that the word "for" in the Statute means to be used in connection with, or simply to be used for, and does not require the manufacturer or printer to actually sell numbers himself or participate in the numbers or policy game. For that reason the Defendants' Motions to Quash the Indictment in each case will be Overruled and the Defendants may have their exceptions."

It is my opinion that the demurrer in these cases goes to the heart of this matter. This statute was written to punish every kind of participation in the so-called "numbers game" and attempted to cover all commonly used names for such games such as "policy," "numbers game," and "clearing house," and then goes on to say "or by words or terms of similar import." The statute also attempted to cover every means by which the chances were sold or disposed of such as a "ticket," "order," or "device." Prior to September 1, 1961, the effective date of the present statute, the statute in effect since September 21, 1943, then known as Section 13063-1 of the General Code, was as follows:

"Whoever vends, sells, barters or disposes of a ticket, order or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house' or by words or terms of similar import, whether located or to be drawn, paid or

carried on within or without this state, shall, upon first conviction thereof, be fined not more than five hundred dollars or imprisoned not more than six months, or both, and, upon the second or succeeding convictions thereof, shall be fined not less than five hundred dollars nor more than one thousand dollars or imprisoned in the penitentiary not less than one year nor more than three years, or both."

When the statutes of Ohio were revised this law then became Section 2915.11 of the Revised Code of Ohio, effective October 1, 1953. Until this section was last amended, effective September 1, 1961, it did not include manufacturing or printing but in the last amendment the words "manufacture" and "print" were added to the statute.

It has since the beginning of our Nation and our state been the policy of this country and of this state that a person should not be punished for a crime unless they knew they were committing a crime or intended to commit a crime but, of course, it was not always necessary to put in the statutes the words that they intended to commit a crime. For instance, it is a crime to commit robbery or rape upon another person and the statute has never specifically stated that this must be done with the intent to do wrong.

Prior to the latest amendment Section 2915.11 simply provided that:

"No person shall vend, sell, barter, or dipose of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' * * *."

That statute did not provide that the selling, bartering or disposing of a ticket, order, or device, for such a purpose should be done with intent to commit a crime because it was quite evident to everyone, layman and lawyer alike, that engaging in such a game was a crime. I find no case

where the constitutionality of the old statute has even been attacked let alone successfully attacked.

The point to be considered here is the amendment to the statutes adding the words "manufacture" and "print." While a person who sells, barters or disposes of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as "policy," "numbers game," and so forth must of necessity know that he is engaging in an illegal activity, the same cannot be said of one who manufactures or prints a ticket, order or device, which may be used in such a scheme of chance. If the ticket, order or device was so clear upon its face that it could only be used for the numbers game so that the person manufacturing it or printing it, must of necessity have known what it was to be used for, there might be no constitutional exception to such a law.

In this case the defendants have asked for a bill of particulars, and in the bill of particulars it is stated that:

"The ticket, order, or device, is described as a pad of paper, 2¾ inches by 5¾ inches in size, containing 150 sheets, with 2 sheets of carbon paper attached at the back of said pad. The sheets in said pad are numbered, serially, from one (1) to fifty (50), with three (3) sheets, yellow, flimsy, and white—each being given the number '1', and so on, so that each paid may be used for fifty (50) separate transactions."

A pad, as described above, is attached to the Bill of Particulars in Case No. 7356, marked Exhibit 1, to which counsel is referred. In addition to the serial numbers mentioned in the Bill of Particulars, each sheet at the top has the letter "M," then the word "date," following that 196 and a little blocked off space below. It may be assumed that in addition to the date space is provided for noting the time of day.

To someone who was familiar with numbers writing it might be apparent that this pad is to be used for that purpose. It could, of course, be used for any notation such as, for example, the listing of a telephone call. Certainly it is not apparent by an inspection of the pad that it is to be used exclusively for the numbers game.

Let's suppose that the defendants had printed a pad of this size without anything being printed on the slips. It could still be used by numbers writers, although it would require them to note the time of day and the date and whatever other number they might have on the separate slips of paper, and if such a plain pad had been manufactured and had been used by numbers writers, would not the manufacturing and printing of such a pad be a crime under the statute as now amended? I believe that it would.

I am of the opinion that as applied to the manufacturer or printer of such a "ticket, order or device" the statute should provide something as follows:

"No person shall manufacture or print a ticket, order, or device, knowing that it is to be used or intending it to be used for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' and so forth."

This would put no impossibility upon the state to show: First, that such a device was used in the numbers game, and, Second, that by reason of the persons to whom the devices were sold, it was used in the numbers game. The lines and numbers on the pad itself could be used as circumstantial evidence that the manufacturer and printer knew the purpose for which it was to be used. Such a statute would protect the innocent and still not make it difficult for the state to punish the guilty.

Since the statute as amended is of very recent origin I think that even a court of common pleas may question the constitutionality of the statute.

I find that the statute, except for the words "manufacture" and "print" is valid and constitutional, but I do find that as to the words "manufacture" and "print," in other words, where it attempts to cover the manufacturer or printer without as to them, requiring that they must know or intend that the device will be used for the numbers game is unconstitutional, under Section 1 of the Fourteenth Amendment to the Constitution of the United States which states that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

I cannot see how Section 16 of Article 1 of the Ohio Constitution applies to Revised Code Section 2915.11.

The indictment follows the statute, as is perfectly proper for an indictment to do, but since I have found that the statute is unconstitutional as to manufacturers and printers, then, of course, I must find that the indictment does not state facts constituting a crime under the laws of this state.

The demurrer to the indictment is, therefore, sustained and the state may have its exceptions.

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MATTHEW BENDER & COMPANY
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APPENDIX D

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

LISBON SALESBOOK COMPANY,
Defendant-Appellant,
Case No. 38370

MARTIN SUFRIN,
Defendant-Appellant,
Case No. 38371

ISADORE SUFRIN,
Defendant-Appellant,
Case No. 38372

JOSEPH SUFRIN,
Defendant-Appellant,
Case No. 38373

MICHAEL SCHIEDLMEIER,
Defendant-Appellant.
Case No. 38374

CERTIFICATE AS TO FEDERAL QUESTION INVOLVED

On motion of defendants-appellants in each of the above entitled cases, Lisbon Salesbook Company, Martin Sufrin, Isadore Sufrin, Joseph Sufrin, and Michael Schiedlmeier, this court in addition to the orders made herein in each of

the above entitled cases, orders it to be certified and made a part of the record in these causes and of the judgments and entries of affirmance heretofore rendered and made herein, that in the prosecution of error from the Court of Appeals of Columbiana County, Ohio, and in the arguments, both oral and by brief, made in this court on behalf of each of the defendants-appellants, it was insisted and relied upon by said defendants-appellants that Section 2915.11, Revised Code of Ohio, was unconstitutional as being in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; and it became material to the determination of said causes in this court to determine said question so made by each of said defendants-appellants, which question was determined adversely to said defendants-appellants, as appears in the opinion rendered by this court and in the entries and judgments of affirmance heretofore made in each of the causes herein.

WITNESS, the Honorable Supreme Court of Ohio, this 23rd day of September, 1964.

SUPREME COURT OF THE STATE OF OHIO
BY KINGSLEY TAFT
Kingsley Taft, Chief Justice of the
Supreme Court of the State of Ohio

CERTIFICATE OF SERVICE

I, R. Brooke Alloway, member of the law firm of Topper & Alloway, attorneys of record for each of the appellants herein, hereby certify that a copy of the above and foregoing Jurisdictional Statement was personally served upon William B. Saxbe, Attorney General of the State of Ohio, State House Annex, Columbus, Ohio, on or before November 12, 1964, and that a copy of the foregoing Jurisdictional Statement was mailed, by certified mail, on or before November 12, 1964, to G. William Brokaw, Prosecuting Attorney, Columbiana County, Court House, Lisbon, Ohio, counsel of record for the State of Ohio, appellee herein.

R. Brooke Alloway